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No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1986

BEVLES COMPANY, INC.,

Petitioner,

v.

TEAMSTERS LOCAL 986,

Respondent.

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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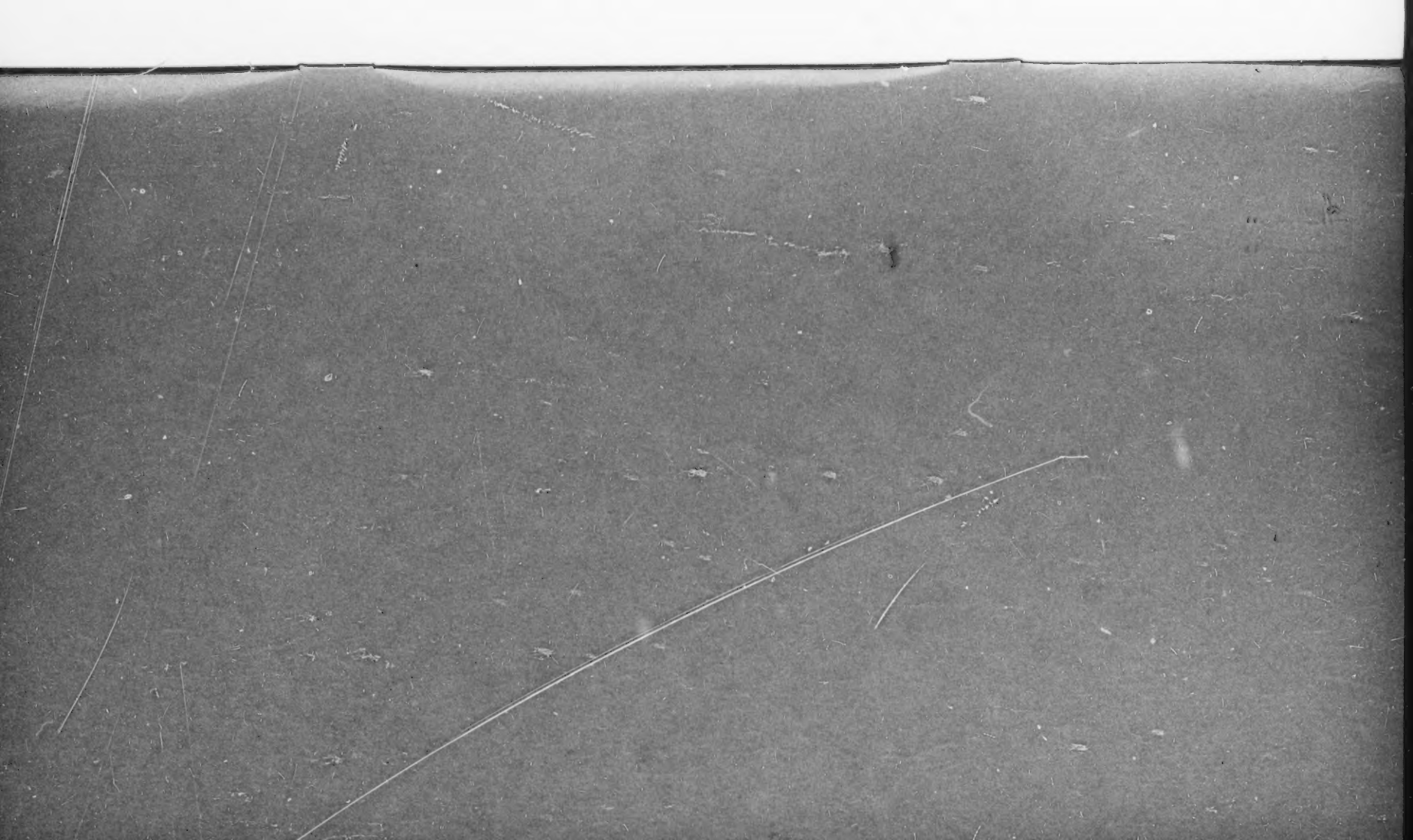

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Teamsters Local 986 ("Union") respectfully prays that a writ of certiorari not issue to review the opinion of the court of appeals for the Ninth Circuit rendered in this case on June 17, 1986 published at 791 F.2d 1391 (9th Cir. 1986).

RELEVANT STATUTES NOT CITED IN PETITION FOR WRIT OF CERTIORARI

Section 8(a)(3) of the Labor-Management Relations Act, 29 U.S.C. Stat. 158(a)(3), provides in pertinent part:

> "It shall be an unfair labor practice for an employer—

* * *

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

Section 1140.4(b) of the California Labor Code provides in pertinent part:

> "The term 'agricultural employee' or 'employee' shall mean one engaged in agriculture, as such term is defined in subdivision (a). However, nothing in this subdivision shall be construed to include any person other than those persons excluded from the coverage of the National Labor Relations Act, as amended, as agricultural employees, pursuant to Section 2(3) of the Labor-Management Relations Act . . . ."

Section 1160.3 of the California Labor Code provides in pertinent part:

> "If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss resulting from the employer's refusal to bargain, and provide such other relief as will effectuate the policies of this part. Where an order directs reinstatement of an employee,

backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him."

STATEMENT OF THE CASE

On March 18, 1983, Petitioner Bevles Company, Inc. ("Bevles") terminated Gilbert Baraza ("Baraza") because he was allegedly an illegal alien and did not possess valid documentation from the United States Immigration and Naturalization Service ("INS") permitting him to work legally in the United States and California. During Baraza's nine (9) years of employment, Bevles was unaware of his undocumented status.

On the same day, Bevles terminated Manuel Dorme ("Dorme") for falsification of employment records. When Dorme was hired in 1976, he used his cousin's name and social security number, professing to be a legal resident, in filling out his employment application since he was in the country illegally. During his employment, Dorme was never questioned about his legal status, name or the admittedly false information he placed on his employment application at the time of his hiring.

The terminations of Baraza and Dorme were triggered by Bevles' receipt of an unsolicited letter from its attorney suggesting that it was unlawful in California to knowingly employ an illegal alien. Since Baraza was unable to substantiate to Bevles' satisfaction he was in California and the United States legally, he was summarily terminated. Similarly, when Dorme's true identity and undocumented status were disclosed, he was discharged.

When the union proved unsuccessful in securing their reinstatement to employment, the contractual propriety

of their discharges was submitted to final and binding arbitration in accordance with the collective bargaining agreement Bevles and the union were signatory to which provided that employees could only be fired for "just cause."

At the commencement of the arbitration hearings, Bevles and the union stipulated that "the arbitrator has the authority to decide the legal issues in this case" and "the impact of external law on the labor agreement." [*See* Petition for Writ of Certiorari ("Petition"), B-3 and B-14.][1]

After the arbitration hearings, both parties submitted briefs. In its written argument, Bevles advocated that it was contractually permissible for it to have terminated Baraza and Dorme because California Labor Code Section 2805 ("Section 2805") imposed criminal sanctions and provided for a private cause of action against employers who knowingly hired aliens not entitled to lawful residence in the United States if such employment would have an adverse impact on lawful resident workers. Bevles stressed that its reliance upon Section 2805 in terminating the employees was appropriate and California's concern in seeking to restrict the employment of undocumented workers was not preempted by federal law. In asserting that position, Bevles primarily relied upon two (2) decisions interpreting California law, *Alonso v. State of California,* 50 Cal.App.3d 242 (1975), and *DeCanas v. Bica*, 424 U.S. 351 (1976).

At no time did Bevles advocate before the arbitrator that it relied upon or the contractual propriety of its

---

[1]Since Bevles in its Petition failed to append the Arbitrator's Opinion and Award in the Dorme case, it is reproduced in the Appendix to this brief.

conduct was governed by the application of federal law or policy. Rather, Bevles proclaimed that its reliance upon state law and policy governed the arbitrator's resolution of the dispute and that, in discharging two (2) undocumented workers, it had acted in a manner consistent with peripheral federal concerns.

In its brief, the union stressed that Bevles was advised, prior to terminating Baraza and Dorme, that the Los Angeles Superior Court had declared Section 2805 unconstitutional on federal preemption, equal protection and due process grounds and permanently enjoined its enforcement and that the California Court of Appeals thereafter affirmed the Superior Court's decision on preemption grounds, finding it unnecessary to consider the due process or equal protection issues. *See Dolores Canning Co. v. Howard*, 40 Cal.App.3d 673 (1974).

Thus, a permanent injunction enjoining the enforcement of Section 2805 in southern California was in effect at the time Baraza and Dorme were terminated.

Additionally, the union contended that Bevles' reliance upon the decision in *DeCanas* was misplaced because this court remanded that case back to the California courts for a decision on the constitutionality of Section 2805 because California courts in the first instance should decide whether it was unconstitutional or conflicted with federal laws and regulations governing immigration. Since *DeCanas* was never heard on remand, the union argued that the state appellate decision in *Dolores Canning* and its affirmance of the lower court's permanent injunction enjoining the enforceability of Section 2805 was the present state of the law in California. Its claim was bolstered by the fact that the administrative regulations promulgated to enforce Section 2805 had been repealed and removed from the California Administrative Code in December of 1982.

Thus, at the time the employees were discharged and the arbitrator rendered his decisions, "[t]he only sanctions that employers have to fear [in California] for hiring illegal workers are . . . the possible embarrassment and incovenience of having deportation proceedings brought against an employee." Mainland, *Counseling Employers Who Hire Aliens*, California Lawyer, Vol. 4, No. 3, p. 9 (March 1984).

On December 14, 1983, the arbitrator concluded that Bevles violated the collective bargaining agreement in terminating Baraza because it was not subject to criminal sanctions for violating Section 2805 in continuing to employ him. Since Bevles was not susceptible to "any significant liability, criminal or civil in California, for failing to check for INS documentation", the arbitrator declared that Bevles' reliance upon California law was misplaced and its insistence upon proof of INS documentation was not a reasonable exercise of management rights under the collective bargaining agreement. [Petition, B-20.]

As a result, the arbitrator ordered that Bevles immediately reinstate Baraza with full back pay, benefits and seniority.

Soon thereafter, on December 26, 1983, the arbitrator ordered that Dorme be reinstated but without back pay. Although he rejected Bevles' reliance upon California law for the same reasons advanced in his earlier decision, the arbitrator reasoned that because of Dorme's willful and deliberate misrepresentations concerning his true identity, he was not entitled to back pay. [A 16-A17 appended hereto.]

In a timely fashion, Bevles moved to vacate both arbitration awards in the United States District Court for the Central District of California. In doing so, Bevles

did not advocate that the contractual dispute was governed by principles of federal law or that it relied upon such in terminating Baraza and Dorme.

It was only on appeal to the Ninth Circuit after the district court confirmed the awards and this court rendered its decision in *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), that Bevles contended for the first time that the arbitration awards ordering the reinstatement of two (2) undocumented workers manifested a total disregard of relevant federal law and policy and, as a result, warranted their judicial vacation.

THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS RENDERED BY OTHER CIRCUITS NOR DOES IT UNDERCUT CALIFORNIA OR FEDERAL POLICY AS INTERPRETED BY THIS COURT

Bevles misconstrues the lower court's opinion in declaring that it ignored this court's holding in *DeCanas*. [Petition, pp. 8-9.]

The Ninth Circuit generously concluded that the state of the law in California concerning Section 2805 at the time the arbitrator made his decisions was "confused". Since the arbitrator correctly concluded that Section 2805 had been declared unconstitutional by the California Court of Appeals and a permanent injunction had been entered enjoining its enforceability, the court below correctly held that the arbitrator had not manifestly disregarded relevant California law or public policy in rendering the awards. In fact, rather than evidencing a manifest disregard of California law, the arbitrator's decisions were in strict conformity with it and since Bevles would not be breaking the law or engaging in an illegal act by complying, the awards were

similarly not violative of California public policy. *Compare Mini-Ranch Farms*, 7 ALRB No. 48 (1981), where the California Agricultural Labor Relations Board ("ALRB"), in discussing eligibility to enjoy the remedies provided individuals by California Labor Code Section 1160.3, remarked that the state legislature precluded the ALRB from differentiating between employees on the basis of citizenship or immigration status. The ALRB also commented that the reference to "employee" in California Labor Code Section 1140.4(b) broadly included undocumented aliens.

The Ninth Circuit's opinion in this case is similarly not violative of federal policy as enunciated by this court in *Sure-Tan*.

In *Sure-Tan*, this court was concerned with the statutory rights of undocumented workers to remedial relief under the Labor-Management Relations Act ("LMRA"), 29 U.S.C. Stat. 158 *et seq.*, and not with whether undocumented workers should be stripped of contractual rights negotiated on their behalf by a union solely because of their undocumented status.

As the court below held, upholding an arbitration award providing reinstatement and backpay to undocumented workers who have been discharged without just cause in violation of a collective bargaining agreement can be easily reconciled with this court's decision in *Sure-Tan* notwithstanding the immigration status of the employees.

In *Sure-Tan*, this court dealt with the National Labor Relations Board's ("NLRB") application of federal labor law, not an arbitrator's interpretation of a collective bargaining agreement where judicial review is much more limited. On this basis alone, the Ninth Circuit's opinion is clearly distinguishable from this court's holding in

Sure-Tan. In accord, Garment Workers Local 512 v. NLRB, ___F.2d___, 122 LRRM 3113, 3128 n. 1 (9th Cir. 1986) (Beezer dissenting).

Additionally, in *Sure-Tan*, this court said that a conflict did not exist between the LMRA and the Immigration and Naturalization Act ("INA"), 8 U.S.C. §101 *et seq.*, and accepted the proposition that "the provisions of the LMRA are applicable to undocumented alien employees." 467 U.S. at 894. *In accord, NLRB v. Apollo Tire Co., Inc.*, 604 F.2d 1180, 1183 (9th Cir. 1979) ("federal immigration statutes neither prohibit employers from hiring illegal aliens nor prohibit such aliens from working and exercising rights protected by the NLRA" and "[w]ere we to hold the NLRA inapplicable to illegal aliens, employers would be encouraged to hire such persons in hopes of circumventing the labor laws. The result would be more work for illegal aliens and violations of the immigration laws would be encouraged") and *Garment Workers Local 512, supra*, 122 LRRM at 3124.

The right to employment is even more compelling when the undocumented worker's terms and conditions of employment are governed by a collective bargaining agreement freely negotiated by his employer and union since "an employer may affirmatively agree through a bargaining agreement to make backpay payments that he would not be obligated by the labor laws to make". *Id.* at 3128 n. 1.

Sure-Tan only addressed the employment status of undocumented workers who were in Mexico during the relevant time period. Since this court believed that the NLRB should take into account the congressional objective of deterring unlawful immigration embodied in the INA, it denied backpay to those undocumented workers who were unavailable for work during the

relevant time period and conditioned offers of reinstatement upon their subsequent lawful reentry into this country. In fashioning such a remedy, it would not only avoid a potential conflict between the LMRA and INA but would discourage such individuals from reentering the United States illegally.

Significantly, this court's concern in *Sure-Tan* was not with awarding reinstatement and backpay to undocumented workers, remedies which it specifically approved, but with the problem of providing those remedies to illegal aliens who have voluntarily left the United States without infringing upon the goal of the INS to deter unlawful entry into this country.

In reconciliating the statutory objectives of both the LMRA and INA, this court only focused upon the period of time an undocumented worker is *no longer* working and residing within the United States as evidenced by its criticism of the Seventh Circuit's estimation of the appropriate backpay period who did not consider the period of time the undocumented workers might have continued working before being apprehended by the INS. Thus, this court in *Sure-Tan* appeared to be concerned with *only* the period of time *after* an employee has been lawfully expelled from the United States and is offered a financial inducement under the LMRA to return illegally.

In affirming arbitration awards involving undocumented workers who remained in the United States and were not the subject of INS deportation proceedings after their discharges, the Ninth Circuit's decision in this case is not inconsistent with this court's opinion in *Sure-Tan* that undocumented workers not situated or working in the United States should not be statutorily encouraged and enticed to reenter this country illegally.

An arbitrator's decision awarding reinstatement and/or backpay to an undocumented worker who was available for work and remained in the United States after discharge after concluding that he was unjustly terminated in violation of a collective bargaining agreement does not conflict with the general federal objective expressed by this court in *Sure-Tan* of deterring unauthorized immigration into the United States.

As a result, the union respectfully requests that this court deny Bevles' Petition for a Writ of Certiorari.

DATED: December 8, 1986

Respectfully submitted,

WOHLNER, KAPLON, PHILLIPS, VOGEL, SHELLEY & YOUNG

By _____

ROBERT D. VOGEL

Counsel of Record for Respondent

APPENDIX

In the Matter of Arbitration Between TEAMSTERS LOCAL 986 and BEVLES COMPANY, INC. (M. Dorme, a.k.a. F. Noriega discharge) FMCS Case No. 83K/16910	ARBITRATOR'S OPINION AND AWARD

APPEARANCES:

For the Company:	SNYDER AND RIOS By: WILLIAM A. SNYDER, ESQ. One Newport Place 1301 Dove Street, Suite 400 Newport Beach, CA 92660
For the Union:	PAPPY, KAPLON, VOGEL & PHILLIPS By: KENNETH P. YOUNG, ESQ. RALPH M. PHILLIPS, ESQ. 1545 Wilshire Boulevard, Suite 211 Los Angeles, CA 90017
Also Present:	Manuel Dorme, a.k.a., Felipe Noriega, Grievant John Walter, President, Bevles Company, Witness Jose (Pepe) Ulloa, Witness Robert Garcia, Business Agent, IBT Helen Ruiz, Interpreter

A hearing was held in this matter at the offices of Teamsters Local 420, South El Monte, California, on August 18, 1983. All evidence and testimony were taken under oath. The parties agreed to file post-hearing briefs and waived the time limits for filing such briefs. This award is issued in timely fashion within the time limits set by the FMCS rules under which this hearing was conducted.

STIPULATIONS

The parties stipulated the grievance procedure has been followed and that the matter is properly before the Arbitrator. They stipulated the Arbitrator has the authority to determine the impact of external law on the agreement.

ISSUE

The parties stipulated in their submission agreement to the following issues for the Arbitrator to decide (JE6):

1. Was the grievant discharged for just cause?
2. If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

Article I, Section (1) (a): MANAGEMENT RIGHTS

> a. The right to manage the business, to shcedule the hours of work, to establish, modify or change work schedules or to direct and determine the size of the working forces including the right to select, hire, promote and transfer employees, *to relieve employees for just cause,* and to determine internal training procedures in accordance with policies established or to be established by the Company. (emphasis added)

FACTS OF THE CASE

The grievant was hired by the Company on January 20, 1983, in his present classification in the machine department. He was hired by then-Superintendent Jose Ulloa, his uncle. The application blank for employment was filled out by Ulloa in its entirety for the grievant. The grievant had never been asked about his legal name or application until February 1983. On February 23, 1983, the grievant suffered an on-the-job injury and was not released medically for work until August 2, 1983. The grievant was discharged on March 18, 1983, for falsification of employment records; namely, his application form.

POSITION OF THE COMPANY

The grievant testified truthfully, to his credit, that he was illegally in the United States and had no valid work authroization from the Immigration and Naturalization Service (INS). Also, he used his cousin's name and social security card while knowing his cousin was back in Tijuana. He and Ulloa conspired to defraud the Company to unlawly employ the grievant. He was paid conspired to defraud the Company to unlawfully employ the grievant. He was paid under his cousin's name and even when he became aware of or caught in the fraud, did not rectify it. Consequently, the grievant validated the fraud.

Mr. Ulloa was aware that the grievant was illegally in the US because he drove the grievant across the border. By misrepresenting the grievant on the application form, Ulloa compounded the fraud. The Company should not be bound by the actions of Ulloa and the grievant.

The Company argues that the State of California is not pre-empted from regulating the employment

relationship covered by Labor Code (LC) s.2805 in a manner consistent with pertinent Federal laws.[1] *Delores Canning Company v. Howard* (40 C.A. 3d 673, 15 Cal Rptr. 435 (1974)) was decided on an issue of Federal law. With respect to LC 2805, the appellate court said that it was "unconstitutional because Congress wanted uniform Federal regulations on employment of aliens, barring state action . . . It interferes with a comprehensive regulatory scheme enacted by Congress in . . . its exclusive power of immigration.

The court in *Delores Canning* (440,441) concluded Congress did not want to burden employers with eliminating illegal alien workers from the labor market. The court questioned whether the INA was sufficiently broad or comprehensive without an administrative agency "to pre-empt the field and bar state action." The court said also that LC 2805 was aimed at helping California residents seek jobs, not immigration control. Congress controls immigration and so California's law is not unconstitutional.

The reasoning of *Delores Canning* has been invalidated. *Delores Canning* was decided by a California appellate court on a Federal question. *Alonso v. State of California*, 50 C.A. 3d 242, 13 Cal Rptr. 536 (1975) better accomodates Federal/state regulatory conflicts. The court found no pre-emption. The plaintiff was an alien who applied for unemployment in California but refused to provide INS documents or state if he entered the United States legally. He was denied benefits because he was "unavailable for work." Yet Alonso took the

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[1]This summary of the Company's position on external law is quoted verbatim from the companion case involving the parties and grievant Barraza, decided by the Arbitrator on December 14, 1983. The Company makes the same argument herein.

same position as the grievant, citing *Delores Canning*. The *Alonso* court found both *Delores Canning* and *DeCanas v. Bica*, 40 C.A. 3d 976, 115 Cal. Rptr. 444, distinguishable and inapplicable.

Alonso found that an illegal alien has no right under the U.S. Constitution to equal employment opportunity and no right to work. Both the Federal government and State of California have a legitimate interest in the issue. One's status is not for the purpose of enforcing or subjugating the Federal immigration laws. Title VIII controls when aliens will be allowed to work in the US. The State of California has a duty not to undermine the . . . intent of Congress or alien registration laws.

The U.S. Supreme Court has invalidated the reasoning of *Delores Canning*. In *DeCanas v. Bica* the Court found that the INA did not preclude state authority to regulate employment of illegal aliens (at page 941). It has "never held" that every state law dealing with aliens is about immigration and therefore pre-empted. LC 2805 was viewed as California's effort to adopt Federal standards in imposing criminal sanctions against employers who knowingly employ undocumented aliens. LC 2805 falls within the state's police powers to regulate employment. The issue is to reconcile state and Federal laws, not to oust one over the other. This section of the labor code seems to be "designed to protect opportunities of lawfully admitted aliens . . . There is evidence that Congress intends that states may regulate the employment of illegal alines" consistent with Federal law.

Next, the Company argues the application of LC 2805 here is consistent with Federal law and legitimate state interests. It says, "No employer shall knowlingly employ an alien who is not entitled to lawful residence in the United States." In the California Administrative Code

(CAC), Title 8, part I, chapter 8, article 1, ss.16209-16209.6, it is provided that an admitted alien shall be requested to produce documents showing legal residency, which will then be sufficient proof of lawful resident status. This means the alien must have Form I-151 or any other INS document authorizing him to work in the United States. The grievant concedes he has no such documents, thus allowing the "inference that his entry into this country was illegal." (at 247)

The Company should not be penalized for the failure of the INS to enforce immigration laws or the grievant to abide by US laws. Given the grievant's posture and the enforceability of LC 2805, the grievant was discharged for just cause.

POSITION OF THE UNION

In order to uphold a dischargefor falsification of records, the Union identified the criteria commonly used by arbitrators which must be met.[2] The criteria are that "the employee gave false answers ir his application and

(1) . . . applicant willingly gave false answers;

(2) such answers were made fraudulently and deliberately;

(3) but for such answers the employee probably would not not have been hired;

(4) neither the employer or its agents has any knowledge of the falsity of such answers, and

(5) where there is no evidence . . . that the applicant made an honest mistake in giving the incorrect answers, or in omitting the information.

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[2] *Rexall Drug Company*, 39 LA 142 (H. Dworkin, 1962)

The grievant did not willfully give false answers. Except for providing Ulloa his birthdate, the grievant provided no information nor did he write out any of the answers on the application. Ulloa did so without consulting the grievant.

Any deliberate fraud was committed by Ulloa, not the grievant. The grievant should not be charged with the incorrect actions of Ulloa.

Next, the Union argues that the Company's English language program gave it constructive knowledge that some of its workers were not entitled to legal residence in the U. S. The Company provided no evidence on this point and therefore did not carry the burden of proof. Also, the grievant attended but one or two sessions briefly before dropping out.

The employer's own agent, Jose Ulloa, knew the grievant's true identity and status, but hired him anyway. There was no evidence presented that the grievant's use of an alias harmed the Company in any way during his seven (7) years of employment. Ulloa created the situation, not the grievant. Ulloa perpetuated the fraud and had hired other employees under similar circumstances.

The Company has failed to carry the burden of proof. It did not show the grievant would not have been hired but for the falsified information. The suspicious timing of the discharge and the grievant's on-the-job injury implies the Company had malicious motives.

The Union seeks back pay to August 2, 1983, the date on which the grievant was ready to return to work from medical leave, until reinstatement.

ARBITRATOR'S FINDINGS AND OPINION

The issue in this case is stipulated to be whether or not the grievant was discharged for just cause. In order to decide the issue, there are three questions which the Arbitrator must answer:

(1) Did the Company discharge the grievant for his work-related injury?

(2) What is the effect of the fraudulent information provided by the grievant or his agent?

(3) What is the impact of external law on the misrepresentations, since the false information was provided with the avoidance of these laws in mind?

The Arbitrator finds the answer to the first question is in the negative. There is no hard evidence of any kind on the record which purports to show that the Company discharged the grievant for the on-the-job injury. The Union was able to show only a correlation in time between the injury and the discharge of the grievant. However, other Hispanic workers were discharged at the same time, workers who suffered no physical injuries. Hence, the Arbitrator finds no more than coincidence relating the two events.

Next is the question of misrepresentation or falsification of records which lead directly to the discharge of the grievant. The criteria of whether or not such falsification can be grounds for just cause discharge were set out in the *Rexall* case and listed on page 5 above. These criteria become widely accepted and were reviewed in *Tiffany Metal Products Mfg. Co.* 56 LA 135, (R. Robertsm, 1971). In the latter case, Arbitrator Roberts noted the criteria were well-accepted by arbitrators, but

in the application of the criteria "precedents stand in great confusion" (at 139). There was some consistency found between limitations periods and severity of misrepresentation, factors to be considered herein.

The four criteria specified by Dworkin and relied upon by the Union (the fifth does not apply to this case) are restated:

(1) Was the misrepresentation deliberate or wilful?

(2) Were false answers made fraudulently and deliberately?

(3) But for such answers would the grievant have been hired?

(4) Did the employer or its agent have any knowledge of the falsity of such answers?

1) *Did the grievant wilfully give false answers?* The Union claims that Jose Ulloa not only filled out the application blank for the grievant, but had done so for others. Also, though the grievant's uncle, Ulloa was an agent of the Company. The Company argued that when the fraud was discovered some seven years later, the grievant claimed the information originally provided was correct even though facts indicated otherwise.

The role of Ulloa is an interesting one which puts him in a conflict-of-interest position. Much is missing from his testimony about how the grievant came to apply at the Company. Ulloa knew the grievant for some 13 years and was the grievant's uncle. On the other hand, he made many hiring decisions on behalf of the Company that were never questioned by top management; at least, the record is silent on this point.

The grievant's testimony at the hearing lead the Arbitrator to find the misrepresentations were wilful at

the time of discovery in March 1983, and there is some strong evidence to suggest wilfulness prior to that time. The grievant knew he was not Felipe Noriega, who was his cousin, but was really Manuel Dorme. Noriega, his cousin, had a valid social security card but was living in Tiajuana, Baja California, Mexico. The grievant used Noriega's social security card (CE1) and name to secure his employment. He signed his cousin's name to Company documents (CE3), declaring falsely that he was a US citizen and claiming exeptions on IRS form W-4. Even though the grievant testified he did not know English and he did not know what he was signing, he did know the difference between his own name and the name of his cousin. He even held previous jobs in the name of Felipe Noriega. So when the grievant was confronted with the true information in March 1983 and still held to the earlier misrepresentation, the grievant's conduct was wilful. There is no question about this finding.

2. *Were false answers made fraudulently and deliberately?* At the time the application was completed by Ulloa, the written misrepresentation was not deliberate on the part of the grievant. Testimony of Ulloa confirms the grievant was not aware of what Ulloa wrote on the form. The grievant's conduct became deliberate overtly in March 1983 and to a lesser degree by his use of his cousin's identity all along. The grievant testified that Felipe Noriega was his working name, not how he held himself out generally or how he intended to hold himself out to others. Corroborating testimony by Ulloa supported this contention, saying that Ulloa called the grievant Meno at work and home.

The Arbitrator finds the grievant's position a curious attempt to have it both ways. The grievant testified Ulloa drove him across the border illegally in 1974. It is clear

that the Company believed the grievant to be Felipe Noriega as late as February 1983. The grievant's own testimony and demeanor indicate that he knew his illegal status might hurt his chances for a job, so he took his cousin's legal identity. The grievant, as well as his uncle, commited deliberate misrepresentatiions.

3) *But for such answers would the grievant have been hired?* The record is clearly in the affirmative. The hiring of production workers was undisputedly the authority and responsibility of Jose Ulloa, Superintendent of Production. His hiring decisions were not overturned nor even checked by Company officers, Mr. Walter or others. Ulloa testified unrebutted that he had hired over 200 workers while he was Superintendent and with the Company.

The Union would have the Arbitrator accept that the Company had constructive knowledge that some of its workers were illegally residing in the U.S. In the sense that Ulloa was the Company's agent, that may be the conclusion to draw. But Ulloa had no reason to tell the Company that he knew he was hiring an illegal worker. Even though the Company is liable for the acts of its agents, it had no guilty knowledge at the time the grievant was hired. The record suggests strongly the grievant would have been hired in any event because of the role of Ulloa.

Also, the misrepresentations were not material at the time of hire, according to Arbitrator Roberts' criteria. There is no evidence of any kind to show the Company was actively checking documentation to avoid immigration problems when the grievant was hired in January 1976. Sometime later in 1976 the Company was raided by the INS, but the grievant was not one of the two employees arrested.

4) *Did the employer or its agent have any knowledge of the falsity of such answers?* Again, the Arbitrator finds from the record that the answer is affirmative. At least, the Company's agent, Ulloa, knew of and perpetuated the falsehood. Ulloa held a high management position and was not questioned about his hiring decisions. When Ulloa left the Company some time after hiring the grievant, the Company did not review hiring decisions nor should they have necessarily done so unless problems were present.

As the Union noted, there was no apparent harm to the Company as a result of the misrepresentation. The grievant was a good worker although this would not of itself excuse a serious violation. He was not picked up in the INS raid in 1976, a factor about which the Company had great concern. The Company was concerned about the potential criminal liability for violation of LC s2805 and Federal immigration laws. As will be discussed below, the Arbitrator has found previously that there was not any risk of this liability being realized.

The Company considered the oral misrepresentation by the grievant as a material factor at the time of the discharge, as the grievant's termination letter stated (JE2). The falsehood was discovered when the Company began an INS document check after receiving an unsolicited newsletter from an outside attorney. Initially the Comapny requested verification of status (CE6) and in doing so found the misrepresentation. Rather than terminate him for no documentation, the Company terminated the grievant for verbally confirming his uncle's misrepresentations made on his behalf.

However, the discussion of materiality by the Arbitrator in *Dayton Malleable Iron Company,* 54 LA

1192 at 1194 (R. Howlett, 1970) is instructive. In footnote one, Arbitrator Howlett cites a decision by Arbitrator Shulman wherein the offense was considered not continuing and therefore non-material after one year of satisfactory performance by the grievant. In the instant case, seven years of satisfactory performance had elapsed before discharge. Even though the Company acted promptly on discovery of its agent's fraud and raised the defense of the continuing nature of the grievance, Arbitrator Shulman's rule mitigates against materiality.

External Law[3] A major finding of fact upon which this case hinges is whether or not LC 2805 is valid and enforced. The several court cases submitted into evidence by the parties trace a line of legal decisions which appear at first blush to declare LC 2805 unconstitutional (*Delores Canning v. Howard,* supra). Then there is *DeCanas v. Bica* (supra) in which the U.S. Supreme Court (USSC) specifically reversed the reasoning of *Delores Canning.* Yet *DeCanas* was dropped by its plaintiff before it could be reheard by the California Court of Appeals. No cases on this point followed *DeCanas* nor has the California Legislature acted to clarify the area. In addition, CAC sections 16209-16209.6 were removed from the C.A.C. on December 15, 1982. The permanent injunction issued by the Superior Court judge in *Delores Canning* appears to be still in effect.

A careful reading of *DeCanas* shows that the Court did specifically discuss LC 2805 and its constitutionality. First, the Court said that LC 2805 was not an "invalid state incursion on federal power" (at 936). The Court saw California's motiviation in passing LC 2805 was

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[3]This section of the opinion is edited from the companion case between the parties involving grievant Barraza. Specific findings rather than rationale are highlighted.

economic, to control employment under its police powers, not to control immigration. A state has the right to use its police powers to protect citizens and legal aliens (at 936). So the Court said that LC 2805 was not unconstitutional. California was not necessarily pre-empted from acting in this area.

However, the lifting of the permanent injunction of *Delores Canning* was left to the Califronia court on remand, which never came when the case was dropped by the plaintiff. The USSC said,

> "there are quesitons of construction of s.2805(a) to be settled by the California courts before a determination is appropriate whether, as construed, s. 2805(a), can be enforced without impairing the Federal superintendence of the field covered by the INA . . ." *DeCanas* at 940.
>
> "it is for the California courts to decide the effect of these administrative regulations in construing s. 2805(a), and thus to decide in the first instance whether and to what extent s2805 as construed would conflict with the INA or other Federal laws or regulations." *DeCanas* at 941.

According to the record before the Arbitrator, LC s2805 is in limbo and still enjoined. Neither the state legislature nor Court of Appeals have acted to lift the injunction.

The Company seeks to show the validity of LCs2805 through the introduction of *Alonso v. State of California,* (50 CA 3d 242, 123 Cal Rptr. 536, 1975). *Alonso* found, in part, that an alien in the U.S. illegally has no constitutional right to work nor does that alien have the right to equal employment opportunity (at 248). The *Alonso* court specifically denied Alonso the

protective umbrella of *Delores Canning* and *DeCanas* because the plaintiffs in these cases were U.S. citizens and Alonso was an undocumented alien. Also, the Labor Code was not an issue in *Alonso* but was used by the plaintiff to shield himself to claim unemployment. Thus, *Alonso* denies protection to illegal aliens with respect to employment. This is consistent with later cases such as *ILGWU v. Sureck,* 681 Fed 2d 624 (9th Circuit), a case not on point but which did require specific knowledge of alien status and a search warrant before the INS could search the workplace. The dissenting opinion in *Alonso* is noteworthy because it establishes that the injunction against enforcement of 2805 was still law in California.

Findings on Just Cause The Arbitrator finds that the evidence and record taken as a whole do not not support a finding of just cause for *discharge* of the grievant. While the wilful and deliberate misrepresentation by the grievant took place in March 1983, at the time of the discharge, materiality was diminished by the long passage of time after hire and by the unenforceability of external law. The Company's own agent perpetrated the misrepresentation for the benefit of the grievant although no harm came to the Company. The misrepresentation was not material at the time of hire. It could have been discovered with background checks although such checks are prudent but not legally required. At the time of the discharge, the falsehood was not material as it was not found by the Arbitrator to be a continuing one.

In fact, the recrod strongly suggests the real motivation for the discharge was the grievant's presumed illegal status and the fact of the uncle's and the grievant's falsehoods were used as the basis for termination.

Undisputed testimony of the grievant showed that other employees were treated differently, especially one M. Kiones (sic), who was not discharged. However, only the grievant falsified his name, a problem that will be resolved in establishing the remedy.

Remedy The Union has demanded reinstatement with back pay to August 2, 1983, the date the grievant was cleared medically to return to work. However, the Arbitrator is not willing to grant the full relief requested. Instead the Arbitrator will modify the discharge to a suspension without pay to the date of reinstatement.

The Arbitrator is mindful that in modifying the discipline from discharge to suspension without pay, the expectations of both parties may not be met. However, this case presents a unique situation and facts involving the labor agreement, external law and different levels of misrepresentation. The circumstances discussed above place responsibility on many shoulders, not just those of the grievant or the Company.

The fact that the grievant misrepresented his true identity is undeniable, even though the Company did not discover it for seven years. In the meantime, the grievant did hold himself out to be someone else while maintaining a good work record. Although mitigating circumstances take away materiality for discharge, the grievant commited a serious offense of a wilful and deliberate nature. Half of the Dworkin criteria were satisfied. To let this act pass without any discipline could make a mockery of the Company's ability to carry out its legitimate functions. Control of the workforce could become difficult, if not impossible. By letting a worker commit a serious, wilful act of misrepresentation with impunity would lessen Management's ability to take proper discipline or discharge action. His coworkers knew, according to testimony of the grievant, that he

was not legal. They knew who was and who was not legally in the U.S. So the grievant was not innocent of all accountability.

There is no language in the labor agreement which expressly allows or restricts the Arbitrator's authority to modify penalties or remedies. At the same time, the Arbitrator is aware of the famous phrase about dispensing "his own brand of industrial justice." *Enterprise Wheel and Car*, one of the trilogy cases, recognized the Arbitrator does have "powers to formulate remedies. . . compatible with national labor policy. . . to reach a "fair solution of a problem. . . . The need is for flexibility in meeting a wide variety of situations." " As Arbitrator Ross noted,[4] in discharge cases (arbitrators) "are not brought in to try the facts, but to review the employer's judgment" as to whether there was sufficient cause for discharge.

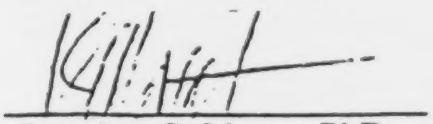
The role of the grievant in this case was a significant one, though mitigated by circumstances discussed above. The Arbitrator would not normally deny the remedy requested or modify the Company's disciplinary action were it not for these special circumstances. It is reasonable for the Arbitrator to make such modifications herein.

Thus, the Company is directed to reinstate the grievant without back pay.

AWARD

The grievant shall be reinstated without back pay.

December 26, 1983
Long Beach, CA



Jonathan S. Monat, PhD
Arbitrator

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[4]quoted from Owen Fairweather, *Practice and Procedure in Labor Arbitration,* 2nd edition, BNA Books, 1983, at 496, 498.

CERTIFICATE OF SERVICE

NO. _____

In The Supreme Court

Of The

United States

OCTOBER TERM, 1986

BEVLES COMPANY, INC.,

Petitioner,

vs.

TEAMSTERS LOCAL 986,

Respondent.

I, ROBERT D. VOGEL, a member of the Bar of this Court, hereby certify that on this 8th day of December, 1986, three copies of the Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in the above case were mailed, first class postage prepaid, to William A. Snyder, Esq. of Snyder, Rios & Quevedo, 2151 Michelson Drive, Suite 100, Irvine, California 92715, legal counsel for Petitioner Bevles Company, Inc., and hereby certify that all parties required to be served have been served with such.

DATED: _____

WOHLNER, KAPLON, PHILLIPS,
VOGEL, SHELLEY & YOUNG

By _____

ROBERT D. VOGEL

Counsel of Record for Respondent